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ALEXANDER L. STEVAS,  
CLERK

NO. 82-1867

IN THE  
SUPREME COURT  
OF THE UNITED STATES

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OCTOBER TERM, 1982

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BEN KOZLOFF, INC.,

Petitioner,

V.

WELLS FARGO BUSINESS CREDIT,

Respondent.

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On Petition for  
Writ of Certiorari  
To the United States Court of  
Appeals for the Fifth Circuit

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BRIEF IN OPPOSITION  
TO PETITION FOR CERTIORARI

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FREYTAG, MARSHALL, LAFORCE,  
RUBINSTEIN, STUTZMAN & TEOFAN  
Vernon O. Teofan  
Harold B. Gold  
1800 Skyway Tower  
400 North Olive  
Dallas, Texas 75201  
(214) 760-8846

ATTORNEYS FOR RESPONDENT

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ATTORNEYS FOR RESPONDENT

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## DESIGNATION OF CORPORATE RELATIONSHIPS

Wells Fargo Business Credit, as Respondent, files this Brief in Opposition to the Petition for Certiorari and states that:

This is the original designation of corporate relationships. Wells Fargo and Company, a California corporation, is the parent company of Wells Fargo Business Credit. Wells Fargo and Company's principal subsidiary is Wells Fargo Bank N.A. Subsidiaries of Wells Fargo Bank are Wells Fargo Asia Limited, Wells Fargo Bank Canada, Wells Fargo Bank International, Wells Fargo Corporate Services, Inc., and Wells Fargo Latin American Bank Cayman Islands Limited. Major affiliates of Wells Fargo Bank are Dubai Bank Limited, Ecuatoriana de Financiamientos, S.A., Empresa Financieras Continental, S.A. and Shanghai Commercial Bank Limited. Commercial nonbank subsidiaries of Wells Fargo are Wells Fargo AG

Credit, Wells Fargo Business Credit, Wells Fargo Capital Markets, Inc., Wells Fargo Equity Corporation, Wells Fargo Credit Corporation, Wells Fargo Insurance Services, Central Western Insurance Company, Wells Fargo Leasing Corporation and Wells Fargo Securities Clearance Corporation. Wells Fargo real estate nonbank subsidiaries are Wells Fargo Mortgage Company and Wells Fargo Realty Advisors.

DATED: June 9, 1983.

## SUMMARY OF OPPOSITION

1. The decision by the Fifth Circuit does not conflict with the decisions of other circuits in general and the Second Circuit in particular with regard to the applicable standards for imputing knowledge and notice of corporate employees to the corporate principal. To the extent that the cases have parallels in their facts, the courts apply the same rules. However, as to the essential facts involved in Corporacion de Mercado Agricola v. Mellon Bank International, 608 F.2d 43 (2d Cir. 1979) and the present case, the cases are dissimilar and call for the application of different rules. As the cases do not deal with the same issues, there is no conflict in holdings between circuits and no basis for review by Writ of Certiorari.

2. The Fifth Circuit followed well established principles for reviewing the

denial of a motion for judgment notwithstanding the verdict. Petitioner has not contested other parts of the Appellate Court's decision which applied the same standard of review and resulted in findings in part favorable to Petitioner and in part unfavorable. This consistent application of well established standards of review does not depart in any way from the accepted and usual course of judicial proceedings and, therefore, it is not necessary that this Court invoke its power of supervision.

3. The present case is maintained in the Federal Court by virtue of the Court's concurrent jurisdiction over cases involving citizens with diverse citizenship. As such, the Federal Court is bound to construe and apply state substantive law in the resolution of the case. Therefore, the Court's holding that detrimental reliance

is an element of waiver is a proper construction and application of Texas law rather than the creation of important federal law. As this case does not involve the creation or application of federal law, there is no need for this Court to review the decision of the Fifth Circuit by Writ of Certiorari.

#### STATEMENT OF FACTS

Wells Fargo Business Credit ("Wells Fargo") is a commercial lending institution (R.257). The Williamson Companies, Inc. ("Williamson") and Ben Kozloff, Inc. ("Kozloff") are frozen seafood brokers and wholesalers (R.257). Greg Williamson is vice president of Williamson (TR.179). Ben Kozloff is the president of Kozloff (TR.226). Williamson bought seafood from and sold seafood to Kozloff (R.257). In May of 1979, Wells Fargo began to finance the business of Williamson. Wells Fargo took a

security interest in all of Williamson's accounts receivable as well as other assets (R.258). While all of the accounts receivable were covered by the security interest, not all accounts receivable were taken into consideration in computing the amount of cash available for advancement to Williamson at any given time (TR.84-87; Def.Ex.12). "Contra" accounts (those persons and entities to whom Williamson sold to as well as purchased from) were not considered eligible in computing the amount of cash advance available. At its option, Williamson could make "contra" accounts available for the cash advance computation by obtaining from the "contra" account and submitting to Wells Fargo, an agreement with the "contra" account, that amounts which Williamson owed the contra account would not be offset against amounts which the contra account owed Williamson. Such an agreement ("no

offset") would entitle Williamson to a larger cash advance from Wells Fargo (TR.92-93,138). Wells Fargo gave Greg Williamson a form which Wells Fargo would consider acceptable if Williamson decided that it wanted to seek a no-offset agreement from a contra account (TR.139). On behalf of Williamson, Greg Williamson attempted to get a no-offset agreement with Kozloff so that the Kozloff account would be used by Wells Fargo in computing the amount of cash advance available to Williamson. Greg Williamson obtained an agreement from Kozloff not to offset accounts (TR.248, app.p.1).<sup>1</sup> Kozloff made this agreement as a favor to Greg Williamson (TR.248) and with the understanding that by signing it Williamson would be able

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<sup>1</sup>The appendix has been lodged with the Clerk of this Court.

to pay Kozloff quicker (TR.249-250). Thereafter, Williamson delivered the Kozloff agreement (Pltf. Ex.1) to Wells Fargo (TR.185). Upon receipt of the Kozloff no-offset agreement, Wells Fargo included the Kozloff account in calculating the amount of cash advance available to Williamson (TR. 100).

On or about June 13, 1979, Kozloff tendered a check (TR. 234) to Williamson which had a typed notation on the back that it was in full payment of certain invoices (App.pp.2,3). Williamson endorsed the check and sent it to Wells Fargo where it was processed by a clerk and deposited (TR. 173,175). Attached to that June 13 check was a sheet ("voucher") which showed a "deduction" to Kozloff in the sum of \$114,918.75 (TR.128-131; Def.Ex.8,9, App.p.4). The "credit" was actually an offset by Kozloff of money due it from Williamson.

Unknown to Wells Fargo, Greg Williamson had previously sent a telex to Kozloff authorizing the offset (TR.193; Def.Ex.3) (TR.169,196,213). Williamson did not alert Wells Fargo to the fact that Greg Williamson had negotiated an offset or that the voucher attached to the June 13th Kozloff check was based upon an offset by Kozloff rather than a credit (TR.168,207; Def.Ex.19). Therefore, Wells Fargo was unaware that the June offset had occurred. In the ordinary course of business, Wells Fargo does not apply payments to specific invoices (TR. 136). When sent to Wells Fargo, the checks are accompanied by a collateral report and a report of collections prepared by Williamson (App. pp.5,6). The documents are reviewed by a collateral processor who merely adds the totals shown on the invoices and then compares that to the amount on line 2 of the collateral report, to see that they are the same. The clerk then looks at the checks

for endorsement and totals the face amount of the checks. That number is compared to the "Collections - Net Cash" column on the collateral report. As the invoices are used only for as examination of the total outstanding accounts receivable, there is no need for a procedure whereby individual invoices are pulled and matched against checks (TR.78 ,130,133,166). The collateral report submitted by Williamson showed sales of \$264,575.18 (on line 2). Invoices 7304 - 7354 and 8900 - 8906 were attached to substantiate the amount of sales reported.

Kozloff did not attempt to offset the Williamson account again until December 28, 1979. At that time, Kozloff offset \$285,597.40 against \$315,647.50 it owed Williamson (TR.218, R. 258, App.pp.7-10). This offset was brought to the attention of Wells Fargo by Greg Williamson (TR.219, 220). The December 28, 1979 checks were handed directly to an officer of Wells Fargo by

Greg Williamson (TR.220). The collateral and collection reports were received by Wells Fargo on January 3, 1980, accompanied by invoices, vouchers and other checks. Wells Fargo subsequently made demand on Kozloff for payment of the amount of offset (R.258). Prior to that time, no one from Wells Fargo ever communicated directly with Kozloff (TR.281).

#### ARGUMENT

##### 1.

The Decision of the Fifth Circuit is Consistent with the Decisions of Other Circuits with Regard to the Applicable Standards for Imputing Knowledge and Notice of Corporate Employees to the Corporate Principal.

The decision of the Fifth Circuit (App. pp.11-20) does not conflict with the law in any other circuit with regard to the applicable standards for imputing knowledge to a

corporation. In particular, to the extent that the decision in this case and the decision in Corporacion de Mercado Agricola v. Mellon Bank International, 608 F.2d 43 (2d Cir. 1979) ("Mellon") involve similar facts, they apply the same rule. It is important to note, however, that the cases essentially involve different fact situations. In Mellon, the claim was made that the corporation did not know of a revocation of a letter of credit because the notice of revocation was sent to the corporation's mailroom rather than its legal department. The Second Circuit rejected this contention and found that the corporation had received the notice. The present case does not involve such a situation. The issue here is whether the information given to Wells Fargo was sufficient to constitute a notice of offset. In Mellon, there was no issue concerning the nature of the documentation sent to the corporation

-- it was on its face a notice of revocation of the letter of credit. In the present case, the documents supplied to Wells Fargo did not on their face effect a notice of offset. Therefore, while the Fifth Circuit did impute to Wells Fargo the knowledge which its employees had from the documents, it found that there was insufficient evidence to conclude that those documents imparted notice of an offset. The contention of Petitioner that the documentation showed an offset is a mischaracterization of the evidence and the Appellate Court's opinion. At no time did Petitioner submit any documentation to either Williamson or Wells Fargo which showed an offset. The Appeals Court went into an extensive review of the documentation which Kozloff and Williamson submitted to Respondent. 695 F.2d at 948. The Court found that the documentation was not in a form that revealed, suggested or implied an offset. The Kozloff "offset"

check listed the amounts offset merely as "deductions." The fact that there were deductions does not logically lead to the conclusion that there had been an offset. Legitimate deductions could be taken for a number of reasons: a return of merchandise, merchandise invoiced but not delivered, or merchandise discounts. Further, Williamson's books reported the \$5,702.25 receipt from Kozloff as a "short" payment rather than full payment on the \$120,621.00 receivable. It is for that reason that neither Wells Fargo's month end reconciliation nor the December, 1979, audit revealed the fact that an offset rather than some other type of legitimate deduction had occurred (TR. 161,171,173, 207). Had the offset been reported properly by Williamson in the collection report to Wells Fargo, the June 20, 1979 report at line 3 column 5 would have

contained the figure \$120,621.00 rather than \$5,702.25 (TR.169).<sup>2</sup>

Given these facts the Fifth Circuit held that to conclude that knowledge of these facts constituted knowledge of an offset placed an unfair burden on Wells Fargo. The Court did not hold that corporate employees had knowledge of an offset. Rather, the Court found that the knowledge which the employees had and which was imputed to the corporate principal was insufficient to logically lead to the conclusion that there had been an offset. Such a holding is not in conflict with Mellon. As there is no conflict of circuits, this Court need not review the decision of the Fifth Circuit by Writ of Certiorari.

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<sup>2</sup>Wells Fargo is not held responsible for any information which Williamson has as there was no agency relationship between the two. 695 F.2d at 944 - 946.

2.

The Fifth Circuit Applied the Proper Standard and Followed Proper Procedure in Reviewing the Trial Court's Denial of Wells Fargo's Motion for Judgment Notwithstanding the Verdict.

In reviewing the Trial Court's denial of Wells Fargo's Motion for Judgment notwithstanding the verdict the Fifth Circuit stated:

Review of a district court's denial of a motion for j.n.o.v. is severely limited. The standard for review, like that for granting the motion, requires that the court review all of the evidence in the light most favorable to the opponent of the motion. If the Court then finds that the facts and references point so strongly and overwhelmingly in favor of one party that reasonable men could not arrive at a contrary verdict, the motion should be granted. Boeing Co. v. Shipman, 411 F.2d 365 (5th Cir. 1969). Where there is conflicting evidence, or there is insufficient evidence to make a "one-way" verdict proper, j.n.o.v. should not be awarded. Powell v. Lititz Mutual Insurance Co., 419 F.2d 62 (5th Cir. 1969).

695 F.2d at 944 n.3. Petitioner does not dispute that this is the correct standard (See, Petition for Writ of Certiorari p. 12). In reaching the conclusion that the Fifth Circuit deviated from this standard, Petitioner misstates the reasoning and holding of the Court. The Court did not find that the evidence established that Wells Fargo had information sufficient to give it notice of the June offset by Kozloff. Indeed, the Court found that the evidence showed that the information in the possession of Wells Fargo did not give notice of the offset. The Court found that at best the evidence showed that deductions had occurred, but that such deductions did not support the inference that an offset had occurred. 695 F.2d at 948, 949. The Court did not weigh the evidence. It properly considered all the evidence and concluded

that the evidence was insufficient to support a finding that the documents given to Wells Fargo gave notice of the June offset. That the jury concluded that the check and voucher were sufficient notice of offset, as Petitioner suggests, is no argument at all.<sup>3</sup> The very existence of the motion for judgment notwithstanding the verdict and the authority of an Appellate Court to review the denial of the motion denies the suggestion that implied findings of a jury are conclusive. The Court is allowed to look at the evidence to determine if it could reasonably support a finding reached by a jury. The evidence in this case is clear that the documentation did not give notice of an offset either directly or by inference. The Fifth Circuit properly

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<sup>3</sup>See, Petition for Writ of Certiorari p. 14. In fact, the jury did not make any such finding. The jury only found that Wells Fargo had waived its rights. 695 F.2d at 943 n.2.

reviewed all the evidence and found that the motion for judgment notwithstanding the verdict should have been granted.<sup>4</sup> The Fifth Circuit has not deviated from the accepted procedures and standards for reviewing a trial Court's denial of a motion for judgment notwithstanding the verdict and thus there is no need for the Court to exercise its power of supervision by issuing a Writ of Certiorari.

3.

The Fifth Circuit Properly Construed  
and Applied Texas Law In Requiring

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<sup>4</sup>It is interesting to note that in its decision, the Fifth Circuit considered several issues concerning whether j.n.o.v. should have been granted. In one instance, the Court found that j.n.o.v. should have been denied. In another, unrelated to the waiver issue, the Court found that j.n.o.v. should have been granted. Petitioner does not question the review by the Court in these instances even though the Court applied the same standard of review for denial of j.n.o.v. and made evaluations of evidence upon which it relied in consideration of the waiver issue. Petitioner has failed to demonstrate how the Court's approach on waiver differed from the other unquestioned parts of its review.

Detrimental Reliance as an Element of Waiver and did not Create Federal Law.

The present case is in the Federal Court by virtue of its concurrent jurisdiction jurisdiction over cases involving parties with diverse citizenship, 28 U.S.C. 1332. As such the Federal Court is bound to apply Texas substantive law to resolve non-procedural issues. Erie R. Co. v. Tompkins, 304 U.S. 64 (1938). The Fifth Circuit construed and applied Texas law in reaching the conclusion that Kozloff had not been misled to its detriment that Wells Fargo intended or consented to the waiver. 695 F.2d at 948, 949. This interpretation of Texas law is correct. Petitioner seeks to dismiss the authority upon which the Court relied for the requirement of detrimental reliance as having been overruled by a subsequent Texas decision. Petitioner incorrectly states Texas law. Petitioner

states that because of the disposition by the Texas Supreme Court of the case upon which the Fifth Circuit relied and the decision in Alford, Meroney & Co. v. Rowe, 619 S.W.2d 210 (Tex.Civ.App. - Amarillo, 1981, writ ref'd n.r.e.), the decision upon which the Fifth Circuit relied had been expressly overruled. Petitioner is wrong. The Fifth Circuit relied on the decision in Miller v. Deahl, 239 S.W. 679 (Tex.Civ.App. - Amarillo, 1922, writ ref'd) for the proposition that before a party can claim waiver it must detrimentally rely on the actions or silence of the party sought to be charged with the waiver. 695 F.2d at 947. The notation "writ refused" in the citation indicates that the Supreme Court approved the result reached but did not necessarily approve the opinion. Brackenridge v. Cobb, 85 Tex. 448, 21 S.W. 1034 (1893), Fleming v. Texas Loan Agency, 87

Tex. 238, 27 S.W.126 (1894). The notation "writ ref'd n.r.e." as in the Alford decision, supra, means that the Supreme Court is not satisfied that the opinion of the Appellate Court in all respects has correctly declared the law, but is of the opinion that the application for a writ of error presents no error which requires reversal. Tex.R.Civ.P. 483. See, Wilson, Hints on Precedential Evaluation, 24 Tex. B.J. 1037 (1961) (giving eight explanations for the writ ref'd n.r.e. designation). Therefore, the writ histories of the two aforementioned cases do not support Petitioner's assertion that the Alford decision expressly overrules the decision in Miller v. Deahl. In addition, Alford does not contain any language whereby it expressly overrules Miller. Indeed, the Miller decision is not even mentioned. Finally, the decision in Alford relies on detrimental reliance by the party seeking to impose the waiver:

The jury could also conclude, from Rowe's evidence that his withdrawal was dependent on waiver of the paragraph 12(c) provision and that the December 6, 1977 memorandum by the partnership announcing Rowe's withdrawal, at a time when Rowe had not received an express reply to his proposal, was conduct of such a nature as to mislead Rowe into an honest belief that the terms of his proposed withdrawal, including waiver of the paragraph 12(c) provision, was assented to.

619 S.W.2d 210, 215.

Notwithstanding the above analysis, the Amarillo branch of the Texas Court of Appeals, the same court upon which Peitioner relies for the proposition that detrimental reliance is not an element of waiver, has held that one of the elements of waiver is reliance by the party claiming waiver. Cox v. Bancoklahoma Agri-Service Corp., 641 S.W.2d 400, 404 (Tex.Ct.App. - Amarillo, 1982, no writ). Therefore, the Fifth Circuit was correct in its interpretation and application of Texas law on the issue of detrimental reliance.

Having determined that Texas law requires that a party detrimentally rely on the conduct of the party sought to be charged with the waiver the Court reviewed the evidence to determine if Petitioner had established all the requisite elements of waiver. There was no evidence that Kozloff had relied on the conduct of Wells Fargo. 695 F2d at 946, 948.

It must be noted that even if the Fifth Circuit erroneously interpreted Texas law on the issue of detrimental reliance this Court would still not need to review the decision. As the case is premised on diversity of citizenship, it is not creating any new federal law. Where a circuit court is construing state law, the review of this Court is unnecessary.

#### CONCLUSION

For the foregoing reasons Respondent respectfully requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

FREYTAG, MARSHALL,  
LAFORCE, RUBINSTEIN,  
STUTZMAN & TEOFAN

By: Vernon O. Teofan  
Vernon O. Teofan

By: Harold B. Gold  
Harold B. Gold

1800 Skyway Tower  
400 North Olive  
Dallas, Texas 75201  
(214) 760-8846

CERTIFICATE OF SERVICE

This is to certify that on the 9th day of June, 1983, I mailed 40 copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari to the Clerk of the United States Supreme Court and 3 copies to Roy J. True and Jerry T. Sneed, True & McCain, 1100 Glen Lakes Tower, 9400 North Central Expressway, Dallas, Texas 75231, by First Class Mail, postage prepaid.

Vernon O. Teofan  
Vernon O. Teofan